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ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CAROL J. KROENING,

Petitioner,

vs.

ARCHDIOCESE OF MILWAUKEE,
ARCHBISHOP REMBERT G. WEAKLAND
and REV. DENNIS C. KLEMME,

Respondents.

ON PETITION FOR CERTIORARI TO THE
COURT OF APPEALS OF WISCONSIN, DISTRICT I

BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Whether the state courts violated the Religion Clauses of the First Amendment by denying the petitioner the right to sue the Archdiocese of Milwaukee for having determined her former husband's right, under the laws of the Catholic Church, to remarry within the Catholic Church?

STATEMENT REQUIRED BY RULE 28.1

Respondent Archdiocese of Milwaukee is a non-stock, non-profit corporation incorporated under Wisconsin law. It has no parent, subsidiary or affiliate companies.

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STATEMENT OF THE CASE

Facts*

The Roman Catholic Church has internal rules and laws governing the validity of marriages and wedding ceremonies within the Catholic Church. Under Church law, one may not marry within the Catholic Church if one has previously entered into a marriage which is still recognized as ecclesiastically valid.

Ecclesiastical validity under the law of the Catholic Church is given to marriages arising from wedding ceremonies performed in other denominations as well as within the Catholic Church. Civil divorce does not affect the ecclesiastical validity within the Catholic Church of a marriage.

A marriage arising from a valid wedding ceremony in the Catholic Church or any other denomination may nonetheless be ecclesiastically invalid within the Catholic Church if the substance of the relationship does not meet the requirements set forth in the law of the Catholic Church. Such invalidity under the laws of the Catholic Church has no necessary relation to the validity of the marriage under either civil law or the law of any other religious denomination.

The Catholic Church has established internal procedures for implementing its religious beliefs and doctrines as to marriage validity. Any member of any religion can request the Catholic Church to make a determination

*The facts set forth here are derived from the petitioner's complaint (which she did not reprint with her petition) and the affidavit of Father Dennis C. Klemme, one of the respondents. The affidavit, which the trial court considered, is principally a statement of Church law and rules.

of whether he is free to marry within the Catholic Church, or whether such marriage is impeded by the validity under the laws of the Catholic Church of the person's previous marriage. The internal rules and laws of the Catholic Church establish ecclesiastical tribunals and appellate review mechanisms to resolve such questions. This church-wide system for resolving marriage questions includes procedures by which information with respect to the question presented is supplied to the tribunals by the parties themselves and by witnesses.

The Metropolitan Tribunal of the respondent Archdiocese of Milwaukee is the designated body for resolving such ecclesiastical questions within the Archdiocese. Respondent Father Dennis C. Klemme is the Officialis of the Milwaukee Metropolitan Tribunal. Respondent Archbishop Rembert G. Weakland is the Chief Judge of the Tribunal, but he takes no active part in its workings.

The petitioner and Charles O. Wildrick, Jr. were married in a Lutheran Church in 1965. The petitioner obtained a divorce from Mr. Wildrick in a Wisconsin court on March 14, 1980 and remarried later that year.

In July 1980, Mr. Wildrick informed the Milwaukee Metropolitan Tribunal of his desire to marry a Catholic woman in a Catholic wedding. This precipitated the events culminating in this lawsuit. Because of the presumptive validity under Church law of Mr. Wildrick's previous marriage to the petitioner, and his desire to remarry within the Catholic Church, he asked that the Tribunal determine whether he was ecclesiastically free to marry in the Catholic Church, or whether his previous marriage precluded the contemplated Catholic wedding.

If he were not free to remarry within the Church, his prospective new wife could not, under the laws of her Church, marry him and remain a practicing Catholic. The Tribunal proceeded upon Mr. Wildrick's request, as it was required to do by the internal rules and laws of the Catholic Church.

Father Klemme wrote two letters to the petitioner in October 1980. The first advised her of the request to the Tribunal to consider possible "Church freedom to marry in reference to your marriage with Charles Oscar Wildrick, Jr." Father Klemme requested that the petitioner make a statement, promised strict confidentiality and stated that the Tribunal was required to proceed with or without her participation. He explained that there were absolutely no civil effects involved.

Father Klemme's next letter thanked the petitioner for her offer to help in the matter and enclosed the Tribunal's questionnaire for spouse's information*. The petitioner informed Father Klemme that she would not participate in the proceedings. The Tribunal ultimately decided that both Mr. Wildrick and the petitioner were ecclesiastically free within the Catholic Church to remarry. As a result, Mr. Wildrick was able to and did marry in the Catholic Church at Eastertime of 1981.

*The petitioner refers to this paper in her petition for certiorari as "elicit[ing] personal information about her sexual practices and views on contraception." Petition at 8. In fact, the questionnaire, which is in the record, includes 7 questions (among 74 in all) going to the issues of consummation, marital fidelity and willingness to have children, all of which may be relevant to an ecclesiastical determination of validity. The petitioner was promised that any answers she might choose to give would be kept in strict confidence, as are all of the Tribunal's proceedings. She did not return the questionnaire.

In July 1981, Father Klemme responded to the petitioner's request for information by advising her that the Tribunal had determined that she and Mr. Wildrick were free, within the Catholic Church and according to the Catholic Church's norms, from their earlier marriage. Father Klemme pointed out that the decision did not detract from the parties' contributions to their marriage and had no effect on the status of children. He emphasized that the decision was based on the content of the relationship, and he offered to answer any further questions.

Proceedings Below

On August 7, 1981, the petitioner filed a complaint in five counts, setting forth various theories under which she contended that the respondents had violated her rights by conducting their inquiry into the Catholic Church validity of her first marriage. She sought damages and a permanent injunction to prevent the respondents from ever again determining the validity under Church law of a marriage between non-Catholics. The respondents moved to dismiss the complaint, both because the complaint and each of its counts failed to state a cognizable claim under state law and because the complaint, as supplemented by an explanatory affidavit, showed the existence of absolute defenses to the action. On February 11, 1982, the trial court entered a judgment dismissing the action.

On appeal, the Wisconsin Court of Appeals affirmed. In an unpublished opinion issued on November 16, 1982, it held that the respondents' rights, under the Free Exercise Clause of the First Amendment and a comparable provision of the Wisconsin Constitution, stood as an in-

superable bar to the success of the petitioner's action. Insofar as the petitioner's action sought civil court review of the correctness of the Tribunal's decision, the Court of Appeals, citing this Court's cases and well-established state law, declined to permit such review. The Wisconsin Supreme Court denied discretionary review on January 11, 1983.

REASONS FOR DENYING THE WRIT

By stating the facts of the case in as much detail as they have, the respondents believe that they have eliminated any need for detailed argument to show the insubstantiality of the constitutional issue presented in the petition. The Court of Appeals simply refused to countenance a lawsuit whose avowed sole purpose was to invoke the sovereign power of the State to prevent the respondents from carrying out their religiously mandated duties, with the ultimate end of preventing the petitioner's former husband and other non-Catholics from remarrying in the Catholic Church.

Because a ruling in favor of the petitioner would deny the respondents their First Amendment rights — and infringe upon the First Amendment rights of those whose consciences require a determination of their freedom to marry within the Catholic Church — the Amendment prohibits such a ruling, even if it would otherwise be proper under general state law. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

In addition to the Free Exercise Clause of the First Amendment, that Amendment's protections of free speech and association preclude the petitioner from succeeding on her claim. The respondents' declaration

of Church freedom to marry is at least a constitutionally protected expression of opinion, see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974); and the State, even for important reasons (not present here) may not override an association's right to control its internal affairs, including the right to decide who should be admitted to membership, see *Democratic Party v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 (1981). This latter right certainly extends to a church's deciding who may receive its sacraments.

In the face of these compelling constitutional objections to the success of her lawsuit, the petitioner takes the Court of Appeals to task (Petition at 9) for failing to balance her "right to sue the respondents for interference in her private life" against the respondents' right not to be prevented from performing ecclesiastical duties. The premise of the petitioner's claim is, of course, that she has a substantive right under state law which was violated by the respondents' conduct. That premise is faulty. None of the five counts of the petitioner's complaint states a claim upon which relief can be granted under state law.

The Court of Appeals might have affirmed dismissal on this state law ground, but chose to address instead the respondents' constitutional defense, which it deemed dispositive. Although the language of the court's opinion* in places speaks in more general terms than were, perhaps, necessary to resolve the case, it was deciding only this case, on only these facts, and was certainly taking into consideration both the nature of the respondents' conduct and the insubstantial effect which it had on the

*The opinion was not published and, thus, has no precedential effect. §§752.41(2), 809.23(3), Wis. Stats. (1981-82).

petitioner (given that the determination of ecclesiastical invalidity has no civil effect and purports to be binding only on the adherents of a church to which the petitioner does not belong). Certainly, the respondents have not sought and do not seek a determination any broader than that the State may not prevent them from carrying out the particular religious function involved in this case.

Moreover, were this Court to reverse the decision below, the case would have to be returned to the Court of Appeals for consideration of the state law sufficiency of the petitioner's claims. Thus, a decision by this Court in the petitioner's favor would not even resolve this one lawsuit. And, contrary to the petitioner's suggestion (Petition at 8) that there are thousands of cases which would be affected by this Court's decision, the respondents are not aware of a single other case in the civil courts in which a non-Catholic is challenging the right of the Catholic Church to determine questions of ecclesiastical freedom to marry within the Catholic Church.

CONCLUSION

The respondents request that the petition for a writ of certiorari to review the decision of the Court of Appeals of Wisconsin, District I be denied.

Respectfully submitted,

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